FOREWORD

SPECIAL ISSUE ON INTERPRETATION IN THE STATES

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Scholars have long explored questions of legal interpretation. For instance, when courts (or other actors) are called upon to determine the meaning of constitutional, statutory, or regulatory provisions, what methodologies should they use, and why? Should the interpretive approach vary based on the type of legal document under review? What should interpreters consider as their overall objective?

While countless scholars explore interpretation at the federal level, far fewer focus on interpretation in the states. Yet there are important reasons to consider state-level interpretation in particular. Interpretive methodologies are not one-size-fits-all, and unique features of state laws and state institutions inform a methodology's suitability. A lack of state-focused research might explain, in part, why state courts sometimes cite federal precedents or invoke federal approaches that may not be well suited to the texts, institutions, or circumstances at hand.[1]

Questions of state-level interpretation are especially pressing today. State courts are deciding highly consequential cases on a wide range of issues—including elections, education, abortion, public health, and much more. At the federal level, two interpretive methodologies—textualism and originalism—increasingly dominate the conversation.[2] Commentary

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1. Recent opinions well illustrate this wider phenomenon. *See, e.g.*, *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 914 N.W.2d 21, 41–42 (Wis. 2018); *Ham v. Portfolio Recovery Assocs., LLC*, 308 So. 3d 942, 946–47 (Fla. 2020); *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710, 735 (Iowa 2022).

2. For discussion of this trend, see, for example, Leah M. Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022 WIS. L. REV. 1241, 1245; Daniel Epps & Ganesh Sitaraman, *The Future of Supreme Court Reform*, 134 HARV. L. REV. F. 398, 413 & nn.74–77 (2021). For recent case law, see, for example, *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126–30 (2022) (opinion of Thomas, J.); *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242–45 (2022) (opinion of Alito, J.).

about these methodologies is extensive, but courts and commentators rarely focus on their application at the state level. Should state courts apply prevailing federal methodologies? Or, alternatively, does the state context call for different approaches?

This Special Issue explores these questions, as well as different ways of thinking about interpretation and the role of state courts more broadly. The essays were part of a conference entitled "Interpretation in the States," hosted by the State Democracy Research Initiative at the University of Wisconsin Law School in May 2022, in collaboration with Professors Anuj Desai, Leah Litman, Victoria Nourse, and Kate Shaw.[3] This was the second annual conference hosted by the Initiative, which fosters academic research on state-level democracy, government institutions, and public law across the nation.[4]

This year's conference brought together leading interpretation scholars and state jurists from around the country. In addition to a judicial panel and opening remarks, our conference featured four academic panels on interpretative methods, the interpretation of state constitutions, the interplay between state constitutions and the U.S. Constitution, and the interpretive implications of state-level institutional context.

A. Judicial Insights

The conference opened with remarks by Wisconsin Supreme Court Justice Rebecca Frank Dallet, whose Essay co-authored with law clerk Matt Woleske opens this Special Issue. *State Shadow Dockets* explores how state high courts issue decisions via "shadow" dockets outside of their normal merits dockets.[5] Although shadow docket decisions (such as rulings on motions for temporary relief) are often brief, unsigned, and issued in an expedited manner without full briefing or argument, they can also be highly consequential. *State Shadow Dockets* considers criticisms of the U.S. Supreme Court's shadow docket—including those around transparency, substance, and public legitimacy—and concludes that these criticisms apply even more forcefully in states like Wisconsin, where the state shadow docket is even less transparent. Drawing on examples from other state high courts, the Essay also suggests reforms to improve the quality of state shadow docket decision-making.

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3. *State Democracy Research Initiative Hosts Conference on Interpretation in the States*, U. WIS. L. SCH. (May 20, 2022), https://statedemocracy.law.wisc.edu/featured/2022/interpretation-in-the-states [https://perma.cc/4DQY-WKUG].

4. *See* Allie Boldt, Miriam Seifter & Robert Yablon, *Foreword: Special Issue on Public Law in the States*, 2021 WIS. L. REV. i (describing essays from the first annual Public Law in the States conference).

5. Rebecca Frank Dallet & Matt Woleske, *State Shadow Dockets*, 2022 WIS. L. REV. 1063.

The conference culminated with a panel featuring Justice Anita Earls (North Carolina Supreme Court), Justice Brian Hagedorn (Wisconsin Supreme Court), Justice Jill Karofsky (Wisconsin Supreme Court), Justice Laurie McKinnon (Montana Supreme Court), and Justice Elizabeth Welch (Michigan Supreme Court). Each justice reflected on a case presenting significant interpretative questions. In a moderated discussion, the justices also reflected on sources that are useful when undertaking legal interpretation.

B. Interpretive Methods: Beyond Textualism

Several essays explore interpretive methods employed by state courts. In *Modified Textualism in Wisconsin: A Case Study*,[6] Professor Anuj Desai examines the framework for Wisconsin statutory interpretation set forth in *State ex rel. Kalal v. Circuit Court for Dane County*.[7] Under that framework, Wisconsin courts start with the language of the statute and then, only if the text is ambiguous, turn to "extrinsic sources of interpretation, such as legislative history."[8] Professor Desai uses *Wisconsin Carry, Inc. v. City of Madison*[9]—a high-profile Wisconsin Supreme Court case involving state preemption of local firearms restrictions—to explore the extent to which *Kalal*'s "modified textualism" approach allows Wisconsin courts to grapple with the stakes in statutory interpretation cases. Professor Desai concludes that while the *Kalal* framework provides structure that can be useful, it is also incomplete; some cases require consideration of legal principles, values, and other tools that do not fit neatly into the "statutory meaning" or "legislative intent" dichotomy.

In *The Textual Canons in Contract Cases: A Preliminary Study*,[10] Professor Ethan Leib evaluates the extent to which the linguistic canons of interpretation are used to interpret contracts in two jurisdictions: New York and California. In addition to sharing his empirical findings, Professor Leib also considers how and why contract cases might track and depart from other kinds of cases in which state courts apply textual canons. The intent of the drafters, for instance, may be more central to interpreting private contract law than to interpreting statutes and ordinances.

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6. Anuj C. Desai, *Modified Textualism in Wisconsin: A Case Study*, 2022 WIS. L. REV. 1087.

7. 681 N.W.2d 110 (Wis. 2004).

8. *See id.* at 124–26.

9. 892 N.W.2d 233 (Wis. 2017).

10. Ethan J. Leib, *The Textual Canons in Contract Cases: A Preliminary Study*, 2022 WIS. L. REV. 1109.

In *Improving (and Avoiding) Interstate Interpretative Encounters*,[11] Professor Aaron-Andrew Bruhl considers an understudied question that arises when a state court encounters and decides to interpret a statute of another state: which state's law of interpretation applies? Professor Bruhl argues that a state court interpreting a sibling state's statute should generally apply the sibling state's interpretive methods rather than its own, while also considering legitimate reasons that can arise *not* to do so. He argues that states can sometimes improve their interpretive encounters with other states' laws by abstaining from reaching a decision altogether. Finally, Professor Bruhl contemplates how federal courts and Congress can help improve such encounters.

C. Interpreting Constitutions: State and Federal

Several other pieces in this Special Issue focus on matters of state constitutional interpretation, as well as questions at the intersection of state and federal constitutional interpretation. In *The Uses of History in State Constitutional Law*,[12] Professor Maureen Brady explores both problems and possibilities that historical materials from state constitutional conventions pose for state constitutional interpretation. Professor Brady discusses reason for caution in the use of convention materials, including concerns regarding the reliability of the records and the nature of state constitutional conventions themselves, and then traces how state courts have cited these materials over time. Brady's account charts a research agenda for continued study of the use of historical materials in state constitutional interpretation.

In *Preemption, Commandeering, and the Indian Child Welfare Act*,[13] Professor Matthew Fletcher and Randall Khalil argue that challenges to the Indian Child Welfare Act (ICWA) based on federal anti-commandeering principles are unfounded. Furthermore, they argue the ICWA is a form of remedial lawmaking authorized by the Fourteenth Amendment of the U.S. Constitution. The authors also describe how various states have adopted their own versions of ICWA, through which enforcement could continue in the event the federal statute is deemed unconstitutional in whole or in part.

In *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*,[14] Professors Leah Litman and Kate Shaw offer a

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11. Aaron-Andrew P. Bruhl, *Improving (and Avoiding) Interstate Interpretative Encounters*, 2022 WIS. L. REV. 1139.

12. Maureen E. Brady, *The Uses of History in State Constitutional Law*, 2022 WIS. L. REV. 1169.

13. Matthew L. M. Fletcher & Randall Khalil, *Preemption, Commandeering, and the Indian Child Welfare Act*, 2022 WIS. L. REV. 1199.

14. Leah M. Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022 WIS. L. REV. 1235.

critique of the "Independent State Legislature Theory" (ISLT): a theory that the U.S. Constitution's Elections Clause empowers state legislatures to regulate federal elections to the exclusion of other state actors, such as state courts. Professors Litman and Shaw explain that while the ISLT purports to elevate state legislatures, it in fact elevates the authority of the federal judiciary to override the judgments of state courts, executive officials, and voters about the meaning of state law. They further consider how the ISLT could effectively compel state courts hearing cases related to federal elections to adopt the sort of textualism now ascendent in the federal courts, thereby limiting the ability of state courts to articulate and apply their own preferred interpretive approaches.

D. Interpretation and State Institutions

Other essays address interpretive questions in the context of specific state institutions. The institutional structures of state government differ from federal institutions in many ways, often providing comparatively more opportunities for democratic participation.[15] For instance, twenty-four states offer voters a direct say on questions of public policy through ballot initiatives, and all but one allow voters to approve legislatively referred constitutional amendments.[16] In *Interpreting Initiatives Sociologically*,[17] Professor Glen Staszewski explores the difficulty courts face when interpreting successful ballot initiatives. While some courts seek to ascertain voters' "popular intent," there is often no clear, agreed-upon "public meaning" as to the precise questions at issue. To interpret initiatives in a way that honors lawmaking by the people, Professor Staszewski proposes a system of deliberative juries, incorporating a variety of relevant legal, ethical, and sociological criteria in an approach he terms "sociological jurisprudence."

In addition to direct democracy, most states also offer voters the opportunity to elect state court judges. In *Polarization, Nationalization and the Constitutional Politics of Recent State Supreme Court Elections*,[18] Professor Jane Schacter examines more than two-hundred state high court

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15. *See generally, e.g.*, Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions,* 119 MICH. L. REV. 859 (2021); Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1768–74 (2021) (describing democratic features of gubernatorial and judicial elections).

16. *See Initiative and Referendum Processes*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 4, 2022), https://www.ncsl.org/research/elections-and-campaigns/initiative-and-referendum-processes.aspx [https://perma.cc/PJ66-AWH7]; Bulman-Pozen & Seifter, *supra* note 15, at 878–79 & n.105.

17. Glen Staszewski, *Interpreting Initiatives Sociologically*, 2022 WIS. L. REV. 1275.

18. Jane S. Schacter, *Polarization, Nationalization and the Constitutional Politics of Recent State Supreme Court Elections*, 2022 WIS. L. REV. 1311.

elections in recent years to explore how partisanship shapes the information voters receive about judicial candidates and the implications for constitutional law and politics. Professor Schacter also highlights the interrelatedness of the federal and state political and legal landscapes, including in the wake of federal decisions like *Dobbs v. Jackson Women's Health Organization.*[19]

In *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts,*[20] Professors Jessica Bulman-Pozen and Miriam Seifter build on their prior research detailing state constitutions' rich, shared commitment to democracy, which they term the "democracy principle."[21] Here, Professors Bulman-Pozen and Seifter explore how the democracy principle can be applied to counter recent state-level efforts to subvert elections, including through power-shifting legislation, sham audits, and criminalization of election administration. They also suggest that state courts may be especially well situated to address these and similar attacks on state institutions.

Collectively, the essays in this Special Issue shed important, new light on challenges and opportunities facing state-level legal interpreters. They offer a timely reminder that scholars of interpretation have much to gain by looking beyond federal law and federal courts. The law of interpretation at the state level deserves continued study.

19. 142 S. Ct. 2228 (2022).

20. Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 WIS. L. REV. 1337.

21. Bulman-Pozen & Seifter, *supra* note 15, at 864.